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Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1296

H. STUART CUNNINGHAM, CLERK, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,
Petitioner,

vs.

CHICAGO COUNCIL OF LAWYERS, AN ASSOCIATION OF LAWYERS, EDGAR BERNHARD, ELMER GERTZ, CECIL C. BUTLER, WILLARD J. LASSERS, ROBERT PLOTKIN, JOHN H. SCHLEGEL, JOEL J. SPRAYREGEN, SAMUEL K. SKINNER, UNITED STATES ATTORNEY, JOHN J. TWOMEY, UNITED STATES MARSHAL, AND TERENCE F. MAC CARTHY, ROBERT S. BAILEY, WILLIAM A. BARNETT, CHARLES A. BELLOWS, EDWARD J. CALIHAN, JR., GEORGE F. CALLAGHAN, GEORGE J. COTSIRILOS, THOMAS D. DECKER, ANTONIO M. GASSAWAY AND CORNELIUS E. TOOLE, GENERAL COUNSEL, LEGAL OFFICE, CHICAGO METROPOLITAN COUNCIL NAACP,
Respondents.

BRIEF FOR RESPONDENTS CHICAGO COUNCIL OF LAWYERS ET AL. IN OPPOSITION TO PETITION FOR CERTIORARI.

MILTON I. SHADUR,
ALEXANDER POLIKOFF,
JOHN MCGINNIS,
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BRIEF FOR RESPONDENTS CHICAGO COUNCIL OF LAWYERS ET AL. IN OPPOSITION TO PETITION FOR CERTIORARI.

Respondents Chicago Council of Lawyers, Edgar Bernhard, Elmer Gertz, Cecil C. Butler, Willard J. Lassers, Robert Plot-

kin, John H. Schlegel and Joel J. Sprayregen respectfully submit that the petition for a writ of certiorari should be denied.

QUESTIONS PRESENTED.

1. Whether the issues sought to be raised by the petitioner are appropriate for discretionary review by this Court at this time.

2. Whether, properly considered (and not as mischaracterized by petitioner), the decision of the Court of Appeals satisfies this Court's standards for the granting of certiorari.

3. Whether the Solicitor General's determination not to seek certiorari should be given weight by this Court in exercising its sound judicial discretion to grant or deny certiorari.

ARGUMENT.

I. The Issues Raised by Petitioner Are Not Now Appropriate for Discretionary Review by This Court.

Petitioner is the Clerk of the United States District Court for the Northern District of Illinois, the only one of the several appellees in the court below who has sought certiorari, and is represented in this Court by private counsel rather than by the Solicitor General. Petitioner asserts (Petition p. 18) that the decision below by the Seventh Circuit undermines the mandate of *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966), conflicts with the decision of the Tenth Circuit in *United States* v. *Tijerina*, 412 F. 2d 661 (10th Cir.), *cert. den.* 396 U. S. 990 (1969), and will frustrate the efforts of the judiciary to prevent prejudice to litigants in civil cases arising out of extrajudicial statements by lawyers during trial. As we point out below, each of these contentions wrongfully characterizes the opinion of the Seventh Circuit and is without merit. Yet even were they arguably meritorious, in the exercise of sound discretion this Court ought not to grant certiorari in this case.

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"Review on writ of certiorari is not a matter of right, but of sound judicial discretion. . . ."[1] In the exercise of that discretion, even petitions which raise serious constitutional questions (which this petition does not) are often denied because "the issue [is] not ripe enough" or because "the question had better await the perspective of time." *Darr* v. *Burford*, 339 U. S. 200, 227 (1950) (quotations from the dissent of Mr. Justice Frankfurter, discussing the significance of such denials). For three reasons the issues sought to be raised by petitioner are not sufficiently ripe for proper review by this Court and would be better dealt with after awaiting the perspective of time and their arising (if indeed they do arise) in proper form in the future.

First, contrary to what petitioner implies, the Seventh Circuit did not irresponsibly scuttle the attempts by the District Court for the Northern District of Illinois to regulate prejudicial extrajudicial statements by attorneys. It is obvious from even a superficial reading of Judge Swygert's opinion that the Court of Appeals was no less concerned than the District Court with assuring fair trials. The Court of Appeals meticulously examined the District Court rules in the dual constitutional light of that concern and of the guarantees of free speech; as the result of its examination, it upheld the rules in a number of respects, pointed out specific instances of the rules' unconstitutional overbreadth in others, and set out clear guidelines to be employed by the lower court in rewriting the rules. We respectfully submit, therefore, that any consideration by this Court should abide the promulgation of new rules by the District Court under the guidelines laid down by the Seventh Circuit, and any contention that may thereafter be made that such rules conflict with the assertion of First Amendment rights by lawyers affected thereby —a contention that may never be made. Under the mandate of the Court of Appeals, the District Court may and presumably will establish new rules that fully preserve the right to a fair trial while avoiding the pitfall of impermissible restraints on

1. Rule 19 of this Court.

freedom of speech, thus obviating any necessity for review by this Court.

Second, whether or not the District Court molds such new rules, the posture of this case makes it singularly inappropriate for this Court's review because it does not present the actual application of restraints to any specific exercise of free speech by respondents. The contrast in this respect between the situation that caused this suit to be brought initially and the situation that now exists, following the Court of Appeals' decision, is striking. When the complaint was filed the very existence of the District Court's vague and overbroad blanket rules created a chilling effect on the exercise of First Amendment freedoms by plaintiffs and all other lawyers that justified—indeed compelled —a judicial determination of plaintiffs' rights (see the majority opinion at Petition p. A-5 and the concurring opinion at Petition p. A-27). But once such chilling impact has been vitiated by the elimination of the blanket advance restraints on speech, the appropriate context for judicial consideration becomes the attempted application of *specific* restraints in a *specific* fact situation. Absent such a specific situation the issues advanced by petitioner are posed in the abstract. As this Court noted in *SS Monrosa* v. *Carbon Black Export*, 359 U. S. 180, 184 (1959):

> "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. . . . Resolution here [of the issue posed by the petition] can await a day when the issue is posed less abstractly."

Third, although petitioner claims the Court of Appeals' decision involves a conflict with the Tenth Circuit, petitioner himself recognizes (Petition, p. 18) that the Seventh Circuit is the first Court of Appeals to rule on the issues presented by this case. As explained at pages 6-7 of this Brief, the Tenth Circuit's *Tijerina* decision did *not* involve the application of a blanket rule proscribing lawyers' speech, as did the instant case; there is therefore no conflict of decisions involved. Moreover, the Seventh Circuit did not reach its decision in a vacuum. It

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grounded its decision firmly on the prior law of the Circuit[2] which was in turn based upon long-standing decisions of this Court.[3] As we understand the operative standards, there is no occasion for this Court, as a matter of sound judicial discretion, to review the settled law of a circuit, grounded upon settled decisions of this Court, prior to an actual conflict with another circuit. We submit that this Court should "await the perspective of time" and a true conflict with other circuits, if one arises, before reviewing the issues raised by petitioner. At a minimum, such issues—now a matter of first impression—should reach this Court's scrutiny with the benefit of the considered judgment of more than one Circuit Court of Appeals. If such judgments produce no conflict, the wisdom of not accepting the issues for review is confirmed; if a conflict develops, the issues are then ripe for this Court's definitive resolution.

II. Petitioner Has Seriously Mischaracterized the Decision Below and Its Effect. Properly Considered, This Case Does Not Satisfy This Court's Standards for the Granting of Certiorari.

It requires only a reading of the thoughtful opinion of the Court of Appeals (Petition pp. A1-25, characterized in Judge Wyzanski's concurrence at p. A27 as "Judge Swygert's thorough opinion, prepared after full review of the authorities and mature consideration of basic principles and suppositious cases") to belie the misleading portrayal sought to be advanced by the Petition. That opinion did not embrace in their entirety the positions asserted by any of the parties or the intervenors before the Court of Appeals. But neither disagreements with that court's conclusions nor eagerness to seek review by this Court can justify misrepresenting the Court of Appeals' treatment of

2. *Chase* v. *Robson*, 435 F. 2d 1059 (7th Cir. 1970); *In re Oliver*, 452 F. 2d 111 (7th Cir. 1971). See Petition pp. A6-7.

3. *Craig* v. *Harney*, 331 U. S. 367 (1947); *Wood* v. *Georgia*, 370 U. S. 375 (1962).

the issues or validate petitioner's unjustified and pejorative characterizations of the decision below.

Because they are relevant to this Court's proper exercise of sound judicial discretion in considering the granting or denial of certiorari, we point to a few of the more egregious misstatements in the Petition in the order of their occurrence:

1. It is irresponsible to speak of the Court of Appeals as "undermin[ing] the *Sheppard* mandate" (Petition p. 18) or as making "a deliberate attempt sharply to limit this Court's decision" in *Sheppard* (Petition p. 20). No fair-minded reader can review the phrase-by-phrase parsing of the "no-comment" rules by Judge Swygert and so characterize his opinion. That opinion, by the very manner in which it has discussed and shaped detailed directives to the District Court for the redrafting of its rules, not only expresses but affirmatively demonstrates a deep concern with the requirements of fair trial.

2. Petitioner offers a complete non-sequitur (Petition p. 23) in support of his argument that a "reasonable likelihood" test is more appropriate than the "serious and imminent threat" test articulated by the Court of Appeals. If, as stated by petitioner, a reasonable likelihood of prejudice will suffice to cause reversal of a criminal conviction, a publication that does create such a likelihood has by definition caused an interference with the administration of justice. The Court of Appeals' test for limiting lawyer comments on pending litigation—whether it constitutes "a serious and imminent threat" to the administration of justice—would *a fortiori* apply to such a comment that *in fact* interferes with the administration of justice. Its formulation of the applicable standard would thus be squarely applicable to reversal-causing prejudice.

3. Despite petitioner's claim (Petition pp. 18, 24-25), the Tenth Circuit decision in *United States* v. *Tijerina*, 412 F. 2d 661 (10th Cir. 1969), *cert. denied* 396 U. S. 990 (1969), is not a "decision in conflict" with the decision below. Although

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the *Tijerina* opinion articulates the constitutionality of a "reasonable likelihood" standard, *Tijerina* is plainly distinguishable from this case because the defendants there were charged with violating a specific order in the pending criminal case in which they were involved, and not general rules of court. Indeed, the public meeting at which the *Tijerina* defendants made their prohibited statements had been specifically discussed between defendants and the judge prior to the event (412 F. 2d at 666):

> "The Court disclosed to counsel the order which it intended to enter and which did not except the convention. No objection was made to the order entered and no effort was made to get it modified or reviewed."

Thus, although the *Tijerina* court did approve the "reasonable likelihood" formulation, it was dealing with a case in which the judge had specifically applied his prohibitory rule to a given set of facts after prior consideration of the probability of prejudice. This is a far different situation from the broad and general prohibitions involved in the present case. As the *Tijerina* court noted in distinguishing the "clear and present danger" precedents upon which the defendants there relied:

> "None of the foregoing decisions considered a situation where the contempt arose from the violation of an order . . . Here we have the violation of a court order." *Id.*

Given these distinctions between *Tijerina* and the present case, the differences in the two courts' verbalizations of the respective issues do not constitute "decision[s] in conflict" within the meaning of this Court's Rule 19.

4. Petitioner charges the Court of Appeals with incantations of formulae—"a dubious practice that is not an adequate substitute for a thoughtful weighing of values" (Petition p. 27). We respectfully refer this Court to Judge Swygert's opinion to consider whether or not it engaged in a "thoughtful weighing of values." It is also irresponsible for petitioner to speak of the decision below as "frustrating all the efforts of the judiciary to

prevent prejudice to litigants in civil cases arising out of extrajudicial statements by the lawyers during trial" (Petition p. 18). Of course, the Court of Appeals agreed (as do we) that "civil litigants, as well as criminal, can be prejudiced in their right to a fair trial by out-of-court statements" (Kaufman Report, quoted at Petition p. 27). Nothing in the Court of Appeals' opinion justifies petitioner's statement (Petition p. 18) that the Court "flatly rejected" that view.[4] Invalidating blanket advance prohibitions on speech, which was the effect of the Court of Appeals' decision (Petition pp. 21-25), in no way precludes the far more responsible approach of dealing with any threat to fair civil trials on a case-by-case basis. Only thus may the chilling effect of blanket prohibitions be eliminated, free speech rights be protected, and any adverse impact on the administration of justice be guarded against simultaneously.

5. Petitioner makes the unsupported—and false—assertion that extrajudicial statements during the course of trial "can only be for one reason—to influence the outcome of the litigation" (Petition p. 28). It is a truism that in the United States most major social and even political issues find their way, in one form or another, to court. In such public interest cases there is a significant societal interest—protected of course by the First Amendment—in having the important social problems presented by such suits fully and accurately discussed and understood by the general population. Our theory of government is staked very largely on the premise of informed and widespread public discussion of important issues. And it is precisely during the pendency of a case involving such issues that discussion is most important. As to this point *Bridges* v. *California*, 314 U. S. 252, 268-69 (1941), said:

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4. The Petition also erroneously characterizes the Court of Appeals' decision in this respect as a "majority" decision rather than a unanimous decision. Judge Castle's opinion at Petition pages A28-29 was a partial dissent as to the Local Criminal Rules, but Judge Castle did not dissent from the invalidation of the Disciplinary Rule applicable to civil litigation.

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> "It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below . . . produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion . . . No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression."

But if the public discussion of the issues in such pending cases is not only permissible but desirable, we risk hampering that discussion if we eliminate from it the lawyer who is handling the case. Progressing from this analysis, the Court of Appeals' opinion (Petition p. A-23) correctly rejected the silencing of the lawyer's voice, which is often the only one likely to be effective. It must be remembered that part of the civil rules struck down by the Seventh Circuit prohibited speech without any stated requirement that such speech affect the administration of justice.

6. Petitioner inaccurately points to the curbing of lawyer speech as "much more likely to give an unfair advantage to those who are powerful and well placed enough to have access to or control over the press and electronic media in marshalling or manipulating public opinion for or against the issues" (Petition p. 29). In truth, the impact of the Seventh Circuit's decision is to avoid the kind of "unfair advantage" referred to—a point that dovetails with the discussion in the preceding paragraph. In the kinds of public interest litigation adverted to there, the principal social problems almost always involve relationships between citizens and their governments. As a practical matter, rules which prevent extrajudicial statements by lawyers in the cases involving major public policy issues will work

principally to the disadvantage of the citizens who are suing their government. The government is surely "powerful and well placed enough" to find an effective way to make its views publicly known without its lawyer; the citizen-plaintiff may not be. To prohibit lawyers' speech on such issues, even though that speech does *not* have an adverse effect on the administration of justice, would be bad public policy as well as bad constitutional law. Moreover, since the "big" case that most frequently involves major public policy issues is likely to run on for years, the lawyer would be barred under the original District Court rules from participating in the public's discussion for a very long time indeed. Thus *Hills* v. *Gautreaux*, No. 74-1047 argued before this Court at the current term, was filed in 1966 and is still very much a "pending case." In that instance plaintiffs' lawyers, representing a class of poor persons, would have been barred from public discussion of the issues for a decade, and would be barred still.

• • • • •

In summary, petitioner has seriously distorted both the opinion below and its claimed effect, in an effort to depict that opinion as irresponsible and as a deliberate flouter of controlling authority. In fact, this first Court of Appeals to deal with the problem has essayed a studied reconciliation of First Amendment rights with blanket court rules whose principal aim is to protect fair trials, and has responsibly grounded its decision on settled law in its circuit and in this Court. The Seventh Circuit's resolution of the issues does not come within any of the reasons articulated in this Court's Rule 19, or afford any other basis, for the granting of certiorari in the exercise of this Court's sound judicial discretion.

III. The Determination by the Solicitor General Not to Seek Certiorari Should Be Given Weight by This Court.

One other factor bears on this Court's exercise of discretion. As stated at the outset of this Brief, H. Stuart Cunningham,

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Clerk of the District Court that promulgated the rules in question, is the sole petitioner in this Court. The original defendants in the suit, all sued in their representative capacity because of their respective roles in enforcement of the challenged rules of court, were the then United States Attorney for the Northern District of Illinois, the then United States Marshal for that district and the then Clerk of the Court. All of those defendants were represented in the District Court and Court of Appeals by the United States Attorney (there were also intervenor-defendants who were separately represented in both courts below, but who have not joined either in the petitions for rehearing below or in the petition for certiorari here).

After the Court of Appeals' decision, however—a decision that adopted neither plaintiffs' entire position nor that of the defendants, but instead directed the District Court to redraft its rules under carefully framed guidelines—the Solicitor General refused to authorize the United States Attorney to file a petition for rehearing with the suggestion that it be heard en banc.[5] We are advised by the Solicitor General's office that it has also declined to file a response to the petition for certiorari with this Court, although this Court's Rule 21(4) specifically permits such a response by any respondent who supports the position of a petitioner.

Thus the Solicitor General, in whom Congress (28 U. S. C. §§ 516, 518, 519)[6] and the Attorney General have vested the

5. Petitioner filed an affidavit with the Court of Appeals stating that he had been so notified by the United States Attorney, at the time petitioner filed his own Petition for Rehearing October 16, 1975. See Appendix to this Brief for an unexecuted copy of the Affidavit. The original Affidavit is part of the record on file with this Court.

6. 28 U. S. C. § 516, "Conduct of litigation reserved to Department of Justice," provides:

> "Except as otherwise provided by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."

(Continued on next page)

responsibility and discretion to conduct all appellate litigation in this Court in which the United States or any officer thereof is a party or is interested,[7] has not joined in seeking review by this Court. Two of the three government officials named as defendants (the United States Attorney and the Marshal) have not joined in the Petition.

In light of the nature of the Seventh Circuit's opinion (which effectively sends the District Court "back to the drawing board" to develop rules which are less sweeping in their prohibition of comment on pending litigation), the Solicitor General's exercise of his discretion by deciding not to press this matter for further review is both understandable and appropriate. We suggest that this Court may properly give weight to that decision in deciding whether to exercise its own discretionary power to review the decision by the Court of Appeals in this case.

CONCLUSION.

For all of the foregoing reasons—the inappropriateness of the issues for present review by this Court, the fact that the Seventh Circuit's decision (properly considered and not mischaracterized) does not satisfy this Court's standards for grant-

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(Continued from preceding page)

28 U. S. C. § 518(a) "Conduct and argument of cases," provides:

> "(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested."

28 U. S. C. § 519, "Supervision of Litigation," provides in relevant part:

> "Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency or officer thereof is a party. . . ."

7. This Court has held that it is within the discretion and power of the Solicitor General to withdraw an issue from a case before this Court. *Utah* v. *United States*, 394 U. S. 89, 95 (1969).

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ing certiorari, and the weight to be given the Solicitor General's determination not to seek certiorari—we submit that the petition for certiorari should be denied.

Respectfully submitted,

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April 1976

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APPENDIX A.

AFFIDAVIT.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

H. STUART CUNNINGHAM, being duly sworn, states that:

1. He is the Clerk of the United States District Court for the Northern District of Illinois, and, in that capacity, has been named as a party defendant in the cause now pending in the United States Court of Appeals for the Seventh Circuit as Cause No. 74-1305.

2. Pursuant to motions heretofore filed, the time for filing a Petition for Rehearing and Suggestion for Rehearing En Banc in this cause has been extended to and including October 17, 1975.

3. He has been notified by the United States Attorney, Samuel K. Skinner, that the Solicitor General of the United States has refused to authorize the United States Attorney to file a petition for rehearing with the suggestion that it be heard en banc.

4. He has retained Henry L. Pitts and W. Gerald Thursby, who have been duly admitted to practice before this court, as his counsel in this proceeding, and said counsel are preparing to file on his behalf a Petition for Rehearing and Suggestion for Rehearing En Banc herein.

5. The number and complexity of the issues in this proceeding and their exceptional importance cannot fairly and adequately be presented within ten (10) pages of standard typographic printing pursuant to Fed. R. App. P. 40(b) and he respectfully requests permission to file such a Petition not exceeding fifteen (15) pages of standard typographic printing.

H. STUART CUNNINGHAM

Subscribed and Sworn to before me this ..... day of ....., 1975.

Notary Public.